APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,
Petitioner,

v.

BANCO NACIONAL DE CUBA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petition for Certiorari filed June 17, 1971
Certiorari granted October 12, 1971

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 60 Civ. 4664

BANCO NACIONAL DE CUBA,

Plaintiff,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant.

Docket Entries

Date	*Proceedings*
Nov. 28–60	Filed complaint & issued summons.
Dec. 6–60	Filed summons & return—served deft. 11-30-60.
Dec. 19–60	Filed stip. & order extending time for deft. to answer to 1-9-61. Clerk.
Jan. 9–61	Filed stip. & order extending time for deft. to answer to 1-19-61. Clerk.
Jan. 19–61	Filed deft's Answer to the complaint.
Mar. 6–61	Filed pltff's amended complaint.
Mar. 6–61	Filed deft's answer to amended complaint.
Mar. 28–61	Filed stip. & order extending time for pltff. to answer to 4-10-61. Noonan, J.
Apr. 11–61	Filed pltff's Reply to counterclaim.
Apr. 21–61	Filed pltff's amended reply to counterclaim.
May 24–61	Filed affdvts., exhibits & notice of motion for summary judgment for deft. on first and second causes of action of amended complaint and for setoffs & counterclaims pleaded in its answer to the amended complaint—Ret. 6/6/61.

Date	*Proceedings*
June 15–61	Memorandum endorsed on notice of motion filed 5/24/61—Motion adjourned from calendar of 6/13/61 to 7/25/61. No interest to be charged from original return date of June 6, 1961 to July 25, 1961. So ordered—Levet, J.
May 26–61	Filed deft's statement pursuant to Rule 9(g).
May 26–61	Filed deft's memorandum of law in support of motion for summary judgment.
July 14–61	Filed affdvt., notice of motion for an order granting leave to pltff. to serve 2nd amended reply—ret. 7/25/61.
July 14–61	Filed pltff's Memorandum in support.
July 20–61	Filed pltff's affidavits of Victor Rabinowitz & Dr. Raul Lopez Gonzalez in opposition to motion for summary judgment.
July 20–61	Filed pltff's memorandum in opposition to motion for summary judgment.
July 20–61	Filed pltff's statement pursuant to rule 9(g), federal rules of Civil procedure.
July 26–61	Memo endorsed on notice of motion filed 7/14/61.—Motion granted. So ordered. Bryan, J.—mailed notices.
Aug. 1–61	Filed pltff's 2nd amended Reply to complaint.
Aug. 7–61	Filed order assigning case to Bryan, J. for all purposes—Ryan, J. (filed in 60-663).
Aug. 23–62	Filed Order to Show Cause why an order should not be made granting leave for applicants to intervene, etc. ret. Aug. 28/62, with affdvt. & pleadings.

Date	*Proceedings*
Aug. 28–62	Memo endorsed on order to show cause filed 8-23-62—This motion is respectfully referred to Judge Bryan—Levet, J.
Oct. 22–62	Filed affdvt. of Victor Rabinowitz.
Nov. 5–62	Memo endorsed on order to show cause filed 8/23/62—Motion granted without opposition. Applicants for intervention are made parties to the action & proposed pleadings, will be deemed their pleadings as intervenors & deemed served upon other ptys. in this action. This is an order. Bryan, J. m.n.
Apr. 20–64	Pre-trial conference held, Bryan, J.
May 28–64	Filed pltff's affdvt. & notice of motion for summary judgment—Ret. before Bryan, J. at a time to be set by Court.
June 22–64	Filed affdvt. of Henry Harfield.
June 22–64	Filed pltff's supplemental brief in support of motion for summary judgment.
July 24–64	Filed pltff's response to deft's reply of 7-8-64.
July 21–67	Filed deft's reply brief.
July 21–67	Filed deft's reply memorandum.
July 21–67	Filed deft's memorandum.
July 21–67	Filed deft's memorandum.
July 21–67	Filed memorandum Opinion #33857—deft's motion for summary judgment on 2nd claim is granted—judgment will be entered accordingly—pltff's cross-motion for summary judgment on its 1st claim & on the counterclaims is denied—deft's motion for

Date	*Proceedings*
	summary judgment on the 1st claim is denied since there are triable issues the case will be tried on the sole issue of amt. which deft. is entitled to assert by way of set-off—So Ordered—Bryan, J. M/N.
July 27–67	—Filed affdvt. of Henry Harfield in opposition to pltff's motion to resettle the order of this Court dated July 20, 1967.
July 27–67	—Filed judgment & order that deft. 1st Nat'l City have judgment against pltff. Banco Nacional De Cuba dismissing the 2nd claim for relief—Bryan, J. judgment entered—Clerk m/n. Ent. 28–67.
Aug. 14–67	—Filed pltff's notice of appeal—mailed copy to Shearman & Sterling.
Oct. 13–67	—Filed memo endorsed on unsigned order—pltff's motion for resettlement is in all respects denied. It is so ordered—Bryan, J., mailed notice.
Nov. 1–67	—Pre-trial conference held—Before Bryan, J.
Mar. 22–68	—Filed stip. & order—If the deft. is lawfully entitled to the offset claimed by it, the amount thereof is such that pltff. will take nothing in this action. This stipulation is made solely for the purpose of permitting entry of a final order & judgment on deft's motion for summary judgment so that pltff. may perfect an appeal from the determinations of law made in the court's opinion dated 7-21-67. Pltff. does not, for any other purpose, make any admissions as to fact or law which may be adverse to it.—So ordered—Bryan, J.

Date	*Proceedings*
Apr. 26–68	Filed Judgment—Ordered, adjudged & decreed that the pltff. take nothing, & that the action be dismissed on the merits & that the deft. First National City Bank have & recover its costs from the pltff., Banco Nacional De Cuba.—Bryan, J. Judgment ent. 4-26-28—Clerk mailed notice. Ent. 4-29-68.
May 20–68	Filed pltff's Notice of Appeal. Mailed copy to: Shearman & Sterling.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 480 and 481—September Term, 1969
Docket Nos. 32533 and 33864

BANCO NACIONAL DE CUBA,
Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Appellee.

Date	*Proceedings*
July 12–68	Filed record (original papers of District Court) (order 7/27/67).
July 12–68	Dep. Acct. 10241 (4702) CD #7.
July 12–68	Filed order extending time to file record to 7-12-68 (& in 33864).
July 12–68	Filed record (original papers of District Court) (& in 33864).
Aug. 15–68	Filed order extending time to serve appellant's designation of the parts of the record, etc. to 9-13-68.
Aug. 1–69	Received Docket Fee (Banco Nacional de Cuba) (order 4/26/68) (& in 33864).
Aug. 6–69	Filed supplemental record (original papers of District Court) (& in 33864).
Dec. 11–69	Filed order extending time to file appellant's brief to 12-12-69 (& in 33864).
Dec. 12–69	Filed joint appendix, with proof of service (& in 33864).

Date *Proceedings*

Dec. 12–69—Filed brief, appellant with proof of service (& in 33864).

Jan. 2–70—Filed order extending time to file appellee's brief, to 2-13-70.

Feb. 10–70—Filed order extending time to file appellees and intervenors brief to 2-27-70 (& in 33864).

Feb. 27–70—Filed brief, intervenors with proof of service (& in 33864).

Feb. 27–70—Filed brief, appellee with proof of service (& in 33864).

Mar. 16–70—Filed order extending time to file appellant's reply brief to 3-16-70 (& in 33864).

Mar. 16–70—Filed reply brief, appellant with proof of service (& in 33864).

Mar. 23–70—Argument heard (by: Lumbard, Hays, CJJ & Blumenfeld, DJ) (& in 33864).

July 16–70—Judgment Reversed and Action Remanded, Lumbard, ChJ. (& in 33864).

July 16–70—Filed judgment (& in 33864) VACATED 2-25-71.

July 30–70—Filed motion to stay issuance of mandate (with proof of service) (& in 33864).

Aug. 4–70—Filed affidavit in opposition to motion to stay issuance of mandate with proof of service (& in 33864).

Aug. 5–70—Filed reply affidavit in response to opposition papers with proof of service (& in 33864).

Aug. 19–70—Filed order granting motion for a further stay of the mandate to 10-14-70 (& in 33864).

Oct. 16–70—Filed notice of filing of petition for writ of certiorari (& in 33864).

SUPREME COURT OF THE UNITED STATES
No. 846—October Term, 1970

FIRST NATIONAL CITY BANK,

Petitioner

v.

BANCO NACIONAL DE CUBA,

Respondent

Date	*Proceedings*
Oct. 13–70	Petition for writ of certiorari filed.
Nov. 10–70	Order extending time to file response unti 11-16-70.
Nov. 16–70	Brief in opposition filed.
Nov. 17–70	Reply brief of petitioner filed.
Nov. 20–70	Memorandum filed. (Gov'n.)
Dec. 19–70	Answer of Banco Nacional De Cuba to memo randum submitted by Solicitor General.
Jan. 4–71	Petition distributed.
Jan. 25–71	Petition granted. Adjudged to be vacated and remanded. See ORDER.
Feb. 23–71	Judgment issued.
Apr. 15–71	Motion of respondent for waiver of clerk's costs filed.
Apr. 16–71	Motion above distributed.
May 3–71	Motion of respondent for waiver of clerk's costs is denied. See ORDER.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 798, 799—September Term, 1970
Docket Nos. 32533 and 33864

BANCO NACIONAL DE CUBA,
Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Appellee.

Date	*Proceedings*
Feb. 1–71	Filed notice from Supreme Court granting petition for writ of certiorari; vacating judgment of this Court and remanding action to Court of Appeals for reconsideration, etc. (& in 33864).
Feb. 25–71	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 33864).
Feb. 25–71	Filed certified copy of judgment of Supreme Court vacating judgment of this Court with costs and remanding action to the U. S. Court of Appeals for reconsideration, etc. (& in 33864).
Feb. 25–71	Filed order directing that additional briefs of parties may be accepted.
Feb. 25–71	Filed brief and appendix, appellant with proof of service (& in 33864).
Feb. 25–71	Filed brief, appellee with proof of service (& in 33864).
Mar. 12–71	Filed reply brief, appellant with proof of service (& in 33864).

Date	*Proceedings*
Mar. 12–71	Filed reply brief, appellee with proof of service (& in 33864).
Mar. 18–71	Argument heard (by: Lumbard ChJ & Hays, CJ & Blumenfeld, DJ) (& in 33864).
Apr. 27–71	Judgment Reversed and Action Remanded, Lumbard, ChJ (& in 33864).
Apr. 27–71	Dissenting in separate opinion, Hays, CJ (& in 33864).
Apr. 27–71	Filed judgment (& in 33864).
May 5–71	Filed copy of notice by Supreme Court denying waiver of clerk's costs.
May 12–71	Filed motion to further stay issuance of mandate (& in 33864).
May 24–71	Filed order granting motion to further stay issuance of mandate (& in 33864).
June 17–71	Filed notice of Supreme Court (by Telephone) of filing of petition for writ of certiorari (& in 33864).
June 21–71	Filed notice of filing of petition for writ of certiorari (& in 33864).
June 21–71	Filed certificate of filing of petition for writ of certiorari (& in 33864).
July 15–71	Filed copy of notice extending time to file a response to the petition for a writ of certiorari in Supreme Court to 9-1-71 (& in 33864).
Oct. 28–71	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 33864).
Nov. 11–71	Certified original, supplemental record and proceedings for Shearman & Sterling, Esqs. (& in 33864).

Amended Complaint

(Exhibit Omitted)

UNITED STATES DISTRICT COURT
Southern District of New York

[Title Omitted]

Plaintiff, by its attorneys, Rabinowitz & Boudin, for its Amended Complaint herein, alleges:

As and for a First Cause of Action:

1. Plaintiff is a corporate body existing under and by virtue of the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba.

2. Defendant is a national banking association, duly organized and existing under the laws of the United States of America, with its principal office located in the City of New York.

3. The jurisdiction of this Court is invoked under 28 U. S. C. 1332, in that plaintiff is a foreign corporation and defendant is a citizen of the State of New York, and the amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

4. On or about July 8, 1958, the defendant entered into a contract with Banco de Desarrollo Economico y Social (hereinafter referred to as Bandes) and with Fondo de

Establizacion de la Moneda (hereinafter referred to a Fondo), by the terms of which the defendant loaned t Bandes the sum of $15,000,000, for a period of one year said loan being secured by United States Government obli gations, owned by Fondo, having a face value in excess o $15,000,000. Bandes and Fondo were both autonomous in stitutions of the Republic of Cuba, having been duly create by the laws of said Republic. A copy of said contract i annexed hereto.

5. On or about July 8, 1959, said loan was extended fo a period of one year.

6. By virtue of Laws 730 and 847, as amended, of th Republic of Cuba, dated respectively February 16, 1960 an June 30, 1960, Bandes was dissolved and the plaintiff suc ceeded to certain of its liabilities, including the obligatio to repay the loan hereinabove referred to. The Republi of Cuba guaranteed the payment of such loan by plaintiff

7. On July 7, 1960, plaintiff made a part payment o said loan to the extent of $5,000,000; at the same time, th loan of the unpaid balance of $10,000,000 was extended fo an additional period of one year.

8. On September 23, 1960, the defendant advised plain tiff that the collateral held as security for the unpaid por tion of the loan had been sold and the proceeds applie against the unpaid principal amount of the loan and inte est thereon.

9. Upon information and belief, the amount realize by the sale of such collateral amounted to $12,412,000; o this sum, $10,000,000 was applied to the unpaid principa amount of the loan and $65,000 was applied to the paymer of interest on said unpaid portion of the loan for the perio from July 7, 1960 to September 23, 1960, leaving a balan due and owing from defendant to plaintiff amounting t $2,347,000.

10. On or about October 13, 1960, Fondo was dissolved by virtue of Law No. 891 of the Republic of Cuba and by virtue of said law plaintiff assumed all of the rights and obligations of Fondo.

11. By virtue of the foregoing, there is now due and owing from the defendant to the plaintiff the sum of $2,347,000.

AS AND FOR A SECOND CAUSE OF ACTION:

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1", "2" and "3" hereinabove.

13. Prior to October 17, 1960, Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, Banco Asturiano de Ahorras, Banco de la Construccion and Trust Company of Cuba were corporations organized and existing under the laws of the Republic of Cuba. For some time prior to that date, said corporations had maintained accounts in their respective names at the office of the defendant in New York City.

14. On October 17, 1960, Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, Banco Asturiano de Ahorras, Banco de la Construccion and Trust Company of Cuba were nationalized by virtue of Law No. 891 of the Republic of Cuba. By the terms of that law, plaintiff became the legal successor of the property and assets of said corporations.

15. Upon information and belief, on October 17, 1960, there was credited to the above mentioned accounts the following sums: To the account of Banco Gelats the sum of $209; to the account of Banco Pujol the sum of $248.86; to the account of Banco de San Jose the sum of $17,783.24; to the account of Banco Castano the sum of $683.51; to the account of Banco Asturiano de Ahorras the sum of $73.59;

to the account of Banco de la Construccion the sum of $101.82; and to the account of Trust Company of Cuba the sum of $14,712.91.

16. On or about October 17, 1960, the defendant closed the said accounts and appropriated the funds therein to itself. Since that time, the defendant has refused to pay over said sums to the plaintiff, although demand therefor has been made.

17. By reason of the aforesaid, defendant is indebted to the plaintiff in the sum of $33,812.93.

WHEREFORE, plaintiff demands judgment against defendant in the amount of $2,380,812.93, together with interest and the costs of this action.

RABINOWITZ & BOUDIN

by VICTOR RABINOWITZ
Attorneys for Plaintiff
Office & P. O. Box
25 Broad Street
New York 4, N. Y.

[EXHIBIT OMITTED]

Answer to Amended Complaint

[Caption Omitted]

Defendant The First National City Bank of New York answers the amended complaint herein as follows:

1. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 thereof except that prior to the commencement of this action plaintiff became and at all times since then has been and now is an agent and instrumentality of the Republic of Cuba wholly owned by said Republic.

2. Admitted.

3. Defendant admits that plaintiff purports to invoke the jurisdiction of this Court under 28 U.S.C. 1332 but denies knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 3 thereof that plaintiff is a foreign corporation.

4. Defendant denies each and every allegation contained in paragraph 4 thereof except that on or about July 8, 1958 defendant entered into a contract with Banco de Desarrollo Economico y Social (referred to in the amended complaint and hereinafter as "Bandes"), Fondo de Estabilizacion de la Moneda (referred to in the amended complaint and hereinafter as "Fondo") and plaintiff; that an accurate copy of this contract is annexed to the amended complaint; and except that defendant denies knowledge or information sufficient to form a belief as to the truth of the allegation that Bandes and Fondo were both autonomous institutions of the Republic of Cuba.

5. Admitted.

6. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 thereof.

7. Defendant denies each and every allegation contained in paragraph 7 thereof.

8. Defendant denies each and every allegation contained in paragraph 8 thereof except that on September 23, 1960 defendant sent a cable to plaintiff reading as follows:

> "YOU ARE ADVISED THAT COLLATERAL HELD AS SECURITY FOR DEMAND NOTE OF BANCO DE DESARROLLO ECONOMICO Y SOCIAL, DATED JULY 8, 1958, HAS BEEN SOLD AND PROCEEDS APPLIED AGAINST PRINCIPAL AND INTEREST AND AS INDICATED IN OUR CABLE SEPTEMBER 20."

"OUR CABLE SEPTEMBER 20" referred to in said cable of September 23, 1960 was a cable which defendant had sent to plaintiff on September 20, 1960 which read as follows:

> "THIS IS TO NOTIFY YOU THAT IN VIEW OF ACTION TAKEN RESPECTING OUR BRANCHES IN CUBA WE HAVE EXERCISED OUR RIGHTS OF LIEN AND OFFSET AND CLOSED YOUR ACCOUNTS AS OF SEPTEMBER 17"

9. Defendant denies each and every allegation contained in paragraph 9 thereof.

10. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 10 thereof.

11. Defendant denies each and every allegation contained in paragraph 11 thereof.

12. Defendant repeats and realleges each and every allegation contained in paragraphs 1, 2 and 3 hereof.

13. Defendant admits that for some time prior to and up to on or about October 14, 1960 it maintained on its books at its head office in New York City accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S. A., Banco Asturiano de Ahorros, S. A., Banco de la Construccion and The Trust Company of Cuba; and except as admitted by the foregoing defendant denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 13 thereof.

14. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 14 thereof.

15. Defendant denies each and every allegation contained in paragraph 15 thereof.

16. Defendant denies each and every allegation contained in paragraph 16 thereof.

17. Defendant denies each and every allegation contained in paragraph 17 thereof.

FOR A FIRST COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT DEFENDANT ALLEGES:

18. This action is brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba.

19. In and before the year 1898 the territory of the Republic of Cuba was a colony of the Kingdom of Spain. In or about April 1898 the peoples of the territory of Cuba asserted their right to independence. On or about April

20, 1898 the United States of America recognized the independence of the peoples of Cuba.

20. In consequence of such recognition the United States of America engaged in war with the Kingdom of Spain and carried on such war for and on behalf of the peoples of Cuba until the peoples of Cuba had been liberated. On December 10, 1898, the Treaty of Paris was duly executed by the United States of America and the Kingdom of Spain, and pursuant to such Treaty the Kingdom of Spain withdrew all of its forces, both military and civil, from Cuba.

21. By reason of the action of the United States of America, the peoples of Cuba were emancipated and were enabled to and did establish an autonomous government for themselves and for the area of Cuba. The United States of America recognized the autonomous government of the Republic of Cuba upon its creation and has continued to extend recognition to the successor lawful governments of the Republic of Cuba.

22. From the inception of the said independent Republic of Cuba, the laws of Cuba have provided for the private ownership of property and for the protection of rights concerning such private property; and by its establishment and administration and enforcement of such laws and otherwise, the Republic of Cuba initially and until the latter part of the year 1960 represented that it would protect and preserve all business legally established within the Republic of Cuba and all private rights acquired therein and would protect and defend all such businesses lawfully carrying out the legitimate objects thereof, and that it was and at all times would be ready, willing and able to meet all of its international commitments and otherwise conform to the Law of Nations.

23. In reliance upon the representations made by the Republic of Cuba for the protection of property and prop-

erty rights and upon its integrity, good faith and dedication to the principles of freedom, all as hereinabove set forth in paragraph 22 hereof, and pursuant to the laws of Cuba and to Section 25 of the Federal Reserve Act, the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba, for the purpose of carrying on the business of banking in furtherance of the foreign commerce of the United States, and for the provision of banking services and facilities for the business activities of Cuba and its inhabitants and the development of its natural resources and trade, all of which comprise the economy of the Republic of Cuba; and in further reliance on said representations, defendant continued to invest in the Republic of Cuba, additional funds and to open and operate additional branches, and on September 16, 1960 defendant maintained and operated eleven distinct and separate branches within the Republic of Cuba.

24. In 1958 the Republic of Cuba applied to the defendant for financial assistance in the form of a loan of United States dollars to be used for governmental purposes of said Republic of Cuba. On or about July 8, 1958, in response to this request, defendant entered into a credit agreement, a copy of which is annexed to the amended complaint, with three agencies or instrumentalities of the Republic of Cuba, designated by it for the purpose, namely, Bandes, Fondo and plaintiff, which agreement provided for a loan by defendant to Bandes of the sum of $15,000,000, such loan to be secured by obligations of the United States Government and of the International Bank for Reconstruction and Development (hereinafter called "the collateral") pledged with the defendant for such purpose by the Republic of Cuba through its agents and instrumentalities, Fondo and plaintiff; and on or about July 8, 1958, at its head office in the City of New York, the defendant received said collateral in pledge and made the loan of $15,000,000 to the Republic of Cuba through its agency and instrumentality, Bandes.

25. On or about December 31, 1958 a new government calling itself the Revolutionary Government of Cuba and being under the leadership of one Fidel Castro assumed de facto control of the Republic of Cuba and on or about January 7, 1959 the United States of America formally extended recognition to Castro's Revolutionary Government.

26. Subsequent to January 7, 1959, the Republic of Cuba formally and expressly reaffirmed its representations, assurances and guaranties with respect to the preservation of private property and with respect to the other matters set forth in paragraph 22 hereof, and to this end on or about February 17, 1959 the Republic of Cuba by the said Revolutionary Government promulgated the Fundamental Law of Cuba, Articles 24 and 87 of which provided and still provide, in English translation, as follows:

> "Article 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.
>
> "The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge."

"Article 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law."

27. In or about July 1959 the Republic of Cuba, through its agent and instrumentality Bandes, requested the defendant to forbear collection of the loan previously referred to for a period of one year; and in reliance upon the representations described in paragraphs 22 and 26 hereof the defendant acquiesced in such request.

28. In or about July 1960 the Republic of Cuba, through its agent and instrumentality, the plaintiff herein, proposed to pay to the defendant on or before July 8, 1960 $5,000,000 of the indebtedness incurred as alleged in paragraph 24 hereof and requested that a proportionate amount of the collateral be released and that demand for the ballance be deferred for a period of a year; and the defendant, in reliance upon the representations as set forth in paragraphs 22 and 26 hereof, and upon the express proviso that the continuance of the loan was predicated on a continuance of the then existing conditions, acquiesced in such request by the Republic of Cuba.

29. On September 16 and 17, 1960, the Republic of Cuba forceably seized and took from the defendant all of the branch offices and the business and property of defendant in the Republic of Cuba, and declared itself substituted for and subrogated in place and stead of the defendant with respect to such property and rights as well as the entire assets and liabilities of defendant within the Republic of Cuba, without the consent of the defendant but against its will, and without compensation of any sort whatsoever.

30. Thereafter the Government of the United States of America protested against the action alleged in paragraph 29 hereof and declared such action to have been forced expropriation taken under color of a discriminatory, confiscatory and arbitrary law.

31. After September 17, 1960 defendant sold the collateral and applied the net amount realized upon said sale to the then unpaid principal amount of the loan and to the interest then accrued and unpaid on said loan, and applied the balance as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

32. On January 3, 1961 the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba on the ground that the harassment and vilification by the said Government of the Republic of Cuba had passed endurance and thus indicated that the normal courtesies extended between friendly nations would not be continued as to the Republic of Cuba.

33. The seizure by the Republic of Cuba of the defendant's property within the territory of the Republic of Cuba as alleged in paragraph 29 hereof was discriminatory, confiscatory and in violation of international law, and the laws of the United States, and the laws of the Republic of Cuba itself.

34. In this action the Republic of Cuba, through its agent and wholly-owned instrumentality the plaintiff herein, seeks to recover from the defendant a sum of money, the amount of which can be determined only in an accounting in equity. The Republic of Cuba is therefore seeking equitable relief and by reason of the tortious acts of the Republic of Cuba is seizing defendant's property and the violation by the Republic of Cuba of its assurances respecting the protection of private property and its own laws and

international law with respect thereto, all as more fully hereinabove set forth, the Republic of Cuba, including its agent and instrumentality the plaintiff herein, comes into this Court with unclean hands and is not entitled to any equitable relief and the action must be dismissed.

For a Second Complete Defense to the First Cause of Action in the Amended Complaint and as a Setoff and Counterclaim the Defendant Alleges:

35. It repeats and realleges each and every allegation set forth in paragraphs 18 through 33 hereof.

36. By reason of the matters hereinbefore set forth, the defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the first cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such damages the amount claimed in the first cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

For a Third Complete Defense to the First Cause of Action in the Amended Complaint and as a Setoff and Counterclaim Defendant Alleges:

37. It repeats and realleges each and every allegation set forth in paragraphs 18 through 33 hereof.

38. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the first cause of action of the amended complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendant and others whose property it seized.

39. No part of such compensation has been paid to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

40. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the first cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the first cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A FOURTH COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT DEFENDANT ALLEGES:

41. The real party in interest is not Banco Nacional de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted in the name of the real party in interest.

FOR A FIRST COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION IN THE AMENDED COMPLAINT AND AS A SETOFF AND COUNTERCLAIM DEFENDANT ALLEGES:

42. Defendant repeats and realleges each and every allegation contained in paragraphs 18-23, inclusive, 25, 26, 29 and 30 hereof.

43. On or about October 14, 1960 the Republic of Cuba purported to enact its Law No. 891 pursuant to which all private Cuban banks were purportedly nationalized by the Republic of Cuba and their assets, including deposits in foreign countries, were purportedly taken over by the Republic of Cuba.

44. On or about October 14, 1960 defendant was advised of the purported enactment of said Law No. 891 and thereupon applied the balances standing to the credit of the accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S. A., Banco Asturiano de Ahorros, S. A., Banco de la Construccion and The Trust Company of Cuba as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

45. Defendant repeats and realleges each and every allegation contained in paragraphs 32 and 33 hereof.

46. By reason of the matters hereinbefore set forth, defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the second cause of action of the amended complaint herein but at present indeterminable, and defendant is entitled to setoff against such damages the amount claimed in the second cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A SECOND COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION IN THE AMENDED COMPLAINT AND AS A SETOFF AND COUNTERCLAIM DEFENDANT ALLEGES:

47. Defendant repeats and realleges each and every allegation contained in paragraphs 42-45 hereof, inclusive.

48. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the second cause of action of the amended complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendant and others whose property is seized.

49. No part of such compensation has been paid to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

50. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the second cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the second cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A THIRD COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION IN THE AMENDED COMPLAINT DEFENDANT ALLEGES:

51. Plaintiff's second cause of action is based upon a claim of right, title and interest in plaintiff to certain assets of those private Cuban banks which are named in paragraphs 13 and 14 of the amended complaint herein. Plaintiff claims to be entitled to these certain assets not as a result of any voluntary act of said private Cuban banks but solely as a result of the purported enactment by the Republic of Cuba of its Law No. 891.

52. Those certain assets which plaintiff is attempting to recover by its second cause of action herein are debts payable in the City and State of New York which were on the date of the purported enactment of said Law No. 891 and still are represented by deposit balances in bank accounts maintained by said private Cuban banks with defendant in the City and State of New York and which constitute property located within said City and State.

53. The said alleged Law No. 891 of the Republic of Cuba is by its terms a confiscatory decree and the Republic

of Cuba has not paid or tendered prompt, adequate and effective compensation to the owners of said private Cuban banks for the forced expropriation of their property through which plaintiff claims to derive its right, title and interest as alleged in its second cause of action herein.

54. It is contrary to the public policy of the State of New York to enforce a confiscatory decree with respect to property located within the State of New York at the date of the decree and the second cause of action therefore fails to state a claim upon which relief to plaintiff can be granted.

FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION IN THE AMENDED COMPLAINT DEFENDANT ALLEGES:

55. The real parties in interest are Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S.A., Banco Asturiano de Ahorros, S.A., Banco de la Construccion and The Trust Company of Cuba and not Banco Nacional de Cuba, the plaintiff herein. The action must be dismissed because it is not being prosecuted in the name of the real parties in interest.

FOR A FIFTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION IN THE AMENDED COMPLAINT DEFENDANT ALLEGES:

56. The real party in interest is not Banco Nacional de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted in the name of the real party in interest.

WHEREFORE, the defendant demands judgment herein

1. Dismissing this action with prejudice;

2. Adjudicating that the Republic of Cuba is liable to the defendant in an amount in excess of the amount specified in the amended complaint herein, without prejudice to the defendant's rights at any subsequent time, through diplomatic channels or in an international forum, in any forum in any foreign nation, or in any court in the United States, to assert such liability of the Republic of Cuba either through affirmative relief or as a matter of defense, offset, counterclaim, or by such other means as may from time to time be available to it;

3. For such other, further and different relief as to the Court may seem just.

Dated: New York, N.Y.
March 6, 1961

SHEARMAN & STERLING & WRIGHT

By HARRY HARFIELD
Member of the Firm
Attorneys for Defendant
20 Exchange Place
New York 5, N.Y.

Second Amended Reply of Plaintiff

[Caption Omitted]

Plaintiff, for its second amended reply, alleges:

As a Reply to the First Counterclaim Alleged in Paragraphs 35 and 36 of the Answer to the Amended Complaint, the Plaintiff:

1. Denies each and every allegation contained in paragraphs 18, 30, 33, 34 and 36 of the answer.

2. The allegations contained in paragraphs 19, 20, 21 and 22 of the answer all relate to historical facts allegedly occurring prior to the establishment of plaintiff and to matters not within the corporate knowledge of the plaintiff or the personal knowledge or memory of its officers. Therefore, the plaintiff denies knowledge or information sufficient to form a belief as to the allegations of said paragraphs.

3. Denies each and every allegation contained in paragraph 23 of the answer, except admits that the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba; that among the purposes of such branch was to carry on the business of banking; and that on September 16, 1960, defendant maintained and operated 11 branches within the Republic of Cuba.

4. Denies each and every allegation in paragraph 24 of the answer, except admits that in 1958 defendant entered into an agreement, a copy of which is annexed to the amended complaint; plaintiff refers to the said copy of the agreement for the terms thereof.

5. Denies each and every allegation contained in paragraph 25 of the answer, except admits that on or about

January 7, 1959, the United States of America formally extended recognition to the present government of Cuba.

6. Denies each and every allegation contained in paragraph 26 of the answer, except admits that on or about February 17, 1959, the Republic of Cuba promulgated a law entitled "Fundamental Law"; plaintiff refers to said law for its contents.

7. Denies each and every allegation contained in paragraph 27 of the answer, except admits that in or about July of 1959, the loan which was the subject matter of the agreement hereinabove referred to was extended for a period of one year.

8. Denies each and every allegation contained in paragraph 28 of the answer, except admits that in or about July, 1960, plaintiff proposed to and did pay to the defendant $5,000,000. of the indebtedness incurred pursuant to the aforementioned agreement and requested that a proportionate amount of collateral be released and that the balance of the loan be extended for a period of one year.

9. Denies each and every allegation contained in paragraph 29 of the answer, except admits that on or about September 16, 1960, the business and property of the defendant in the Republic of Cuba was nationalized.

10. Denies each and every allegation contained in paragraph 31 of the answer, except admits that after September 17, 1960, defendant sold the collateral held as security for the unpaid portion of the loan.

11. Denies each and every allegation contained in paragraph 32 of the answer, except admits that on January 3, 1961, the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba.

As a Reply to the Second Counterclaim Alleged in Paragraphs 37 Through 40 Inclusive of the Answer to the Amended Complaint, the Plaintiff:

12. Repeats and realleges each of the denials and admissions set forth in paragraphs 1 through 11 inclusive hereinabove.

13. Denies each and every allegation contained in paragraphs 38, 39 and 40 of the answer.

As a Reply to the Third Counterclaim Alleged in Paragraphs 42 Through 46 Inclusive of the Answer to the Amended Complaint, the Plaintiff:

14. Repeats and realleges each of the denials and admissions set forth in paragraphs 1, 2, 3, 5, 6 and 9 hereinabove.

15. Denies each and every allegation contained in paragraphs 30, 33 and 46 of the answer.

16. Denies each and every allegation contained in paragraph 43 of the answer, except admits that on or about October 14, 1960, the Republic of Cuba enacted Law No. 891 and plaintiff refers to that law for the contents thereof.

17. Denies each and every allegation contained in paragraph 44 of the answer, except admits that on or about October 14, 1960, the defendant seized balances standing to the credit of the accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano S.A., Banco Asturiano de Ahorros, S.A., Banco de la Construccion and the Trust Company of Cuba.

18. Denies each and every allegation contained in paragraph 32 of the answer, except admits that on January 3, 1961, the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba.

AS AND FOR A REPLY TO THE FOURTH COUNTERCLAIM ALLEGED IN PARAGRAPHS 47 THROUGH 50 INCLUSIVE OF THE ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF:

19. Repeats and realleges each and every allegation contained in paragraphs 14 through 18 inclusive hereinabove.

20. Denies each and every allegation contained in paragraphs 48, 49 and 50 of the answer.

AS AND FOR A FIRST, AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF ALLEGES:

21. The allegations set forth in each of said counterclaims do not state claims upon which relief can be granted.

AS AND FOR A SECOND, AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF ALLEGES:

22. Plaintiff is an autonomous financial institution which, under the laws of the Republic of Cuba, is not responsible for the obligations of the Republic of Cuba.

AS AND FOR A THIRD, AFFIRMATIVE DEFENSE TO EACH OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF ALLEGES:

23. To the extent, if any, to which plaintiff may be responsible for the obligations of the Republic of Cuba, it is entitled to immunity from a suit in a court of the United States.

As a Partial Defense to Each of the Counterclaims Alleged by Defendant in its Answer to the Amended Complaint:

24. Plaintiff realleges each and every allegation contained in paragraph 23 hereof.

Wherefore, plaintiff demands judgment against the defendant:

(a) Dismissing defendant's counterclaims;

(b) Awarding judgment to the plaintiff in the sum demanded by the complaint; and

(c) Awarding the plaintiff interest and the costs and disbursements of this action.

Dated: New York, N.Y.
August 1, 1961

Rabinowitz & Boudin

by Victor Rabinowitz
Member of the Firm
Attorneys for Plaintiff
25 Broad Street
New York 4, N. Y.

Opinion and Order, Dated July 20, 1967 and Entered July 21, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT, NEW YORK

July 20, 1967

BANCO NACIONAL DE CUBA,

Plaintiff,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant.

No. 60 Civ. 4664.

Shearman & Sterling, New York City, for defendant; Henry Harfield, Charles C. Parlin, Jr., William Harvey Reeves, New York City, of counsel.

Rabinowitz & Boudin, New York City, for plaintiff; Victor Rabinowitz, Mary M. Kaufman, Henry Winestine, Eleanor Fischer, New York City, of counsel.

Opinion

FREDERICK VAN PELT BRYAN, *District Judge:*

This action by Banco Nacional of Cuba (Banco Nacional), the financial agent of the Government of Cuba, against The First National City Bank of New York (First National City) is one of the numerous cases before me raising issues arising out of confiscations of American-owned property in Cuba by the Castro Government.

The amended complaint alleges two claims for relief, the first for the excess realized by First National City on the sale of collateral held as security for a loan, and the second for deposits by nationalized Cuban banks in First National

City in New York. The answer pleads a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches. First National City has now moved for summary judgment pursuant to Rule 56(a), F.R.C.P., and Banco Nacional has cross-moved for the same relief on the first claim and for judgment dismissing the counterclaims. Rule 56(b).

I.

The facts giving rise to the first claim for relief are not in serious dispute. On July 8, 1958, First National City, a New York banking corporation doing business in New York and throughout the world, made a loan of fifteen million dollars to Banco de Desarrollo Economico y Social (Bandes), a governmental corporate agency of the Republic of Cuba. The loan was secured by United States Government bonds and obligations of the International Bank of Reconstruction and Development pledged to First National City by Fondo de Estabilizacion de La Moneda (Fondo), another Cuban governmental agency, and Banco Nacional. On January 1, 1959, the Castro Government took control of the Republic of Cuba. The fifteen million dollar loan to Bandes was renewed for another year on July 8, 1959. Thereafter by virtue of Cuban Law No. 730, February 16, 1960, and Law No. 847, June 30, 1960, Bandes was dissolved and Banco Nacional succeeded to the rights and obligations with which we are concerned in this action, including the obligation to repay the loan. The Republic of Cuba guaranteed repayment. On July 7, 1960, the terms of the loan were renegotiated for the last time. Banco Nacional repaid five million dollars, and requested and obtained an agreement from First National City to defer demand for the balance of ten million dollars for one year. A proportionate amount of collateral was then released.

September 16, 1960, however, marked the date of an irreparable breach of the relationship between these parties. On that day the Cuban militia seized all eleven of First National City's branches located in Cuba. On the following

day the issuance of Executive Power Resolution No. 2 left no uncertainty as to the permanent nature of these confiscations; under the terms of the resolution the Cuban State was declared "subrogated" to all of First National City's rights, obligations, and liabilities.[1]

In the light of this turn of events First National City, on September 23, 1960, sold the collateral it held as security for the unpaid portion of the loan and applied the proceeds in payment of the principal obligation and accrued interest. Defendant concedes—and plaintiff for purposes of this motion does not deny—that the amount realized on the sale of collateral exceeded by $1,810,880.51 the ten million dollars of unpaid principal and the $65,000 interest then due.[2] The first claim for relief seeks judgment for the amount of the excess.

The answer of First National City to the first claim alleges in substance that the Republic of Cuba is the real party in interest in this action, that the Cuban government is indebted to the defendant in an amount exceeding the sum demanded in the amended complaint by reason of the confiscation of its Cuban property, and that therefore the defendant is entitled to set off this outstanding obligation as a complete defense to the claims asserted by Banco Nacional. First National City has also interposed an affirmative counterclaim for the amount of the excess, and seeks dismissal of plaintiff's claim with prejudice. Both parties recognize that this court on the present papers cannot determine the value of First National City's Cuban properties which have been confiscated. But apart from this issue of fact the basic questions in this case are posed by the motions before me.

The ultimate legal issues on the first claim are clearly drawn. Banco Nacional strenuously contends that the affirmative counterclaim and the set-off by way of defense are

[1] See note 6, infra.

[2] The amount sought in the first count of the amended complaint was $2,347,000.

barred, alternatively, by principles of sovereign immunity and the act of state doctrine. The dispositive question is simply whether defendant is precluded on those grounds from asserting—either affirmatively or by way of set-off as a complete defense—a claim for the value of its confiscated Cuban properties.

II. *Sovereign Immunity*

There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation.[3] And as a general rule a state which initiates proceedings in a court of another sovereignty waives immunity from a counterclaim or set-off to the extent that it does not exceed the amount of the state's claims. ALI, Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965). This waiver extends to defensive counterclaims which do not arise out of the subject matter of the claims of the state which initiated the

[3] Plaintiff at various times has argued that defendant's claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity. This position is, of course, flatly inconsistent with the sovereign immunity argument. Moreover, throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional De Cuba was an instrumentality of the Cuban government. Banco Nacional v. Sabbatino, 193 F. Supp. 375 (S.D. N.Y. 1961), aff'd, 307 F.2d 845 (2d Cir. 1962), rev'd, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). As Judge Weinfeld pointed out the complaint there alleged that plaintiff was a "public corporation wholly owned by the government." Banco Nacional De Cuba v. Sabbatino, 27 F.R.D. 255, 258 (S.D. N.Y. 1961). The present amended complaint alleges only that plaintiff "is a corporate body existing under * * * the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba." But any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional. Plaintiff alone has exclusive charge of directing the banking function of the state. Law No. 891, arts. 1, 2, 3, Oct. 14, 1960. And it is plaintiff who shall exercise "the monetary sovereignty of the Nation." Law No. 930, art. 1, Feb. 23, 1961. The Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit. Compare Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930).

action. National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955); Wacker v. Bisson, 348 F.2d 602, 610 (5th Cir. 1965); American Hawaiian Ventures, Inc. v. M. V. J. Latuharhary, 257 F. Supp. 622, 626-627 (D. N.J. 1966); See Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). The ultimate policy reason for this is simply that "fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438, 84 S. Ct. 923, 945, 11 L. Ed. 2d 804 (1964); see Pugh & McLaughlin, Jurisdictional Immunities of Foreign States, 41 N.Y.U. L. Rev. 25, 53-54 (1966).

So viewed, there is no doubt that the assertion of First National City's defensive counterclaim as a set-off is not barred because plaintiff happens to be an instrumentality of the Cuban government. When a foreign government institutes suit in the courts of this country, it can expect nothing more and nothing less than substantial justice between the parties. Since the decision in National City Bank of New York v. Republic of China a suit brought by a foreign government is no longer a one-way street. The doctrine of sovereign immunity cannot be raised in this court as a technical bar to any legitimate defensive counterclaims or set-offs advanced by First National City.[4] Whether the defendant has such legitimate defenses—and if so in what amount—are, of course, entirely separate questions.[5]

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[4] Pons v. Republic of Cuba, 111 U.S. App. D.C. 141, 294 F.2d 925 (1961), cert. den., 368 U.S. 960, 82 S. Ct. 406, 7 L. Ed. 2d 392 (1962), is not to the contrary because the party there aggrieved by the Cuban confiscation was a Cuban national.

[5] As mentioned, First National City has also interposed an affirmative counter-claim to recover the amount by which the compensation for the confiscations exceeds the $1,810,880.51 figure. I hold, however, that plaintiff's limited waiver of immunity by instituting this suit permits only the assertion of a defensive counterclaim that "does not exceed the amount of the state's claims." Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965).

III. *The Act of State Doctrine.*

The basis for defendant's set-off is that the Government of Cuba, in whose shoes Banco Nacional stands, confiscated eleven of First National City's Cuban branches without compensation and in violation of international law. Under Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964), inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting "in judgment on the acts of the government of another, done within its own territory." 376 U.S. at 416, 84 S. Ct. at 934, quoting Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). However, the holding in *Sabbatino* was for all practical purposes overruled by the Hickenlooper amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), as amended 79 Stat. 658-659 (Sept. 6, 1965), the constitutionality of which has been upheld. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D. N.Y. 1965), aff'd, July 31, 1967 (2d Cir.). Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state "in violation of the principles of international law, including the principles of compensation." The Hickenlooper amendment specifically stated that it did not apply "in any case in which an act of a foreign state is not contrary to international law".

The ultimate act of state doctrine issue boils down to whether the confiscation of First National City's Cuban property violated principles of international law. In my view the seizures here involved had precisely this effect for a combination of reasons.

In the first place the various decrees authorizing the confiscations did not provide for adequate payments to First National City. The scheme of "illusory compensation" outlined by Judge Waterman in *Sabbatino,* 307 F.2d

at 862, has been totally ineffective in practice in the intervening years. No compensation whatsoever appears to have been forthcoming and none can reasonably be expected in the foreseeable future.

It is true that both the Second Circuit and the Supreme Court in *Sabbatino* pointedly refrained from resolving the delicate question of whether the mere failure, without more, to provide adequate compensation to aliens whose property has been expropriated constitutes a breach of international law. 376 U.S. at 428-430, 84 S. Ct. 923; 307 F.2d at 862-864. But Congressional passage of the Hickenlooper Amendment has removed any doubt on this score—at least insofar as the courts of this country are concerned. While the reference to the "principles of compensation" in 22 U.S.C. § 2370(e)(2) is somewhat open-ended because it does not state specifically that compensation is a *sine qua non* of full compliance with international law, subsection (1) of the same statute leaves no doubt as to the views of Congress on the subject. That provision requires the suspension of assistance under the foreign aid program to the government of any state which, after effectuating the confiscation of property that is at least 50 percent owned by United States citizens or corporations, "fails within a reasonable time * * * to take appropriate steps * * * to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law". The legislative history of the Hickenlooper Amendment and its extensions is replete with statements reaffirming what is plain on the face of the legislation, i.e., that international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property. S. Rep. No. 170, 89th Cong., 1st Sess. at 19; 110 Cong. Rec. 18936-37, 18946 (Aug. 14, 1964); 110 Cong. Rec. App. A5157 (daily ed. Oct. 7, 1964) (Senator Hickenlooper's Statement on Conference Report); see 22 U.S.C. § 2370(a)(2).

It is clear to me that this rule of compensation legislatively announced by Congress is fully consistent with generally accepted principles of international law established by the authorities reviewed by the appellate courts in *Sabbatino*. It is therefore unnecessary to reiterate the settled proposition that "the rules of international law * * * are subject to the express acts of Congress." United States ex rel. Pfefer v. Bell, 248 F. 992 995 (E.D. N.Y. 1918). This court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here. See The Nereide, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769 (1815); Paquette Habana, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); United States v. Siem, 299 F. 582, 583 (9th Cir. 1924); Schroeder v. Bissell, 5 F.2d 838 (D. Conn. 1925); Reeves, The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy of Errors, 20 Vand. L. Rev. 429, 492-93 (1967).

There is more to this case, however, than a naked failure by the Cuban government to comply with general principles of compensation. Violations of international law spring from other sources also. The September 16, 1960, takeover of First National City's branch banks in Cuba had all the earmarks of the seizure of American-owned properties which Judge Waterman in *Sabbatino* condemned as violative of international law for reasons apart from the failure to provide compensation. Here, as in *Sabbatino,* the expropriations were consummated under Cuban Law No. 851, July 6, 1960, which granted the government *carte blanche* authority to confiscate all properties owned by nationals of the United States. As Judge Waterman pointed out, see 307 F.2d at 865 n. 14, this law plainly was passed as a retaliatory measure against the United States Goverment's reduction of the sugar quota allotted to Cuba. On September 17, 1960, the day after the Cuban militia seized defendant's branches, the Cuban government issued Executive Power Resolution No. 2, which, like Resolution No. 1 in-

volved in *Sabbatino,* justified the seizures of American-owned property as retaliation for an "act of cowardly and criminal aggression," that is, the reduction of the sugar quota.[6]

[6] The vitriolic language of Resolution No. 2, Def. Ex. 22, left no doubt as to the retaliatory and discriminatory motivation for the bank seizures:

"Whereas: Law No. 851 of July 6, 1960, published in the *Gaceta Oficial* of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the Government of the United States of America and the representatives of monopolistic interest of that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has forced our economy to become dependent on a single crop and a single export.

"[C]onfiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country." 307 F.2d at 866. Thus the allegations in the decrees that the general public interest necessitated the seizures of First National City's property must be discounted when the manifest purpose of the confiscations was political retaliation of the rankest sort.

Moreover, as in *Sabbatino*, the reprisals involved in this case evidently evince discrimination rising to the level of a violation of international law. Not only was Law No. 851 aimed solely at United States Nationals, but also a general confiscation of the remaining Cuban banking properties did not take place until October 14, 1960,[7] almost a month after First National City's branches were seized. Even then the end result was not that Cuban-owned enterprises and American-owned enterprises were treated alike, compare 307 F.2d at 845, because the compensation provisions for Americans, unlike those for Cuban citizens, were entirely

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Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counter-revolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with the obvious intention of promoting conspirational activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary duty, to nationalize all the American

dependent upon the creation of a fictitious fund consisting of "twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban sugar in excess of three million Spanish long tons at a price of not less than 5.75 cents per English pound (f.a.s.)." 307 F.2d at 862. Beyond this, First National City obviously was damaged by discrimination to the extent it did not enjoy the profitable use of its Cuban properties during the period non-American bank enterprises operated unmolested.

IV.

The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law. Thus First National City is entitled to set-off against the first claim for relief such

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banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

We Resolve:

First, To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York
2. The First National Bank of Boston
3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to the above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies."

* * * * *

[7] Law No. 891, Def. Ex. 10.

amount as may be due and owing to it from the Cuban Government as compensation for the seized Cuban properties, and I so hold.[8]

Banco Nacional is quite correct in pointing out that the amount owing to First National City from the Government of Cuba under the applicable international law "principles of compensation"[9] cannot be determined on this record. The actual amount of the set-off which can be asserted here poses delicate questions of fact and law requiring further careful consideration. See *Reeves*, supra at 505-508, for a consideration of some of the factors involved. It therefore cannot be determined on these motions whether, as defendant contends, the amount of the set-off equals or exceeds the sum of $1,810,880.51 admittedly owning to the plaintiff. If it does, defendant is entitled to judgment dismissing count one.[10]

V.

The second claim for relief may be speedily disposed of. It alleges that a number of Cuban banks which were nationalized pursuant to Law No. 891 in October, 1960, at that time maintained accounts with the defendant at its office in New York City. Banco Nacional as agent of the Cuban Government now lays claim to these funds, amounting to some $33,812.93, by virtue of the confiscation decree declaring

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[8] The *Sabbatino* amendment is inapplicable "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States, and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here.

[9] 22 U.S.C. § 2370(e).

[10] Any sum which First National City is permitted to set-off in this action will, of course, have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City. See International Claims Settlement Act, § 501, 78 Stat. 1110 (1964), 22 U.S.C. § 1643.

it to have full title to the property of the Cuban banks who maintained these accounts in New York.

The short answer to this claim is simply that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. den., 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966), quoting ALI, Restatement of Foreign Relations Law § 46 (Proposed Official Draft, 1962). The Cuban decree, like the attempted confiscation of the accounts in *Republic of Iraq,* is plainly contrary to our policy and laws. It is not entitled to extraterritorial enforcement in United States courts as to property located within the United States. Republic of Iraq v. First National City Bank, supra; see F. Palicio y Compania v. Brush, 256 F. Supp. 481 (S.D. N.Y. 1966), aff'd per curiam, 375 F.2d 1011 (2d Cir. 1967); see Note, International Conflict of Laws: Limitations Imposed On Effect American Courts May Give Foreign Confiscations, 1966 Duke L.J. 828. Defendant is therefore entitled to judgment dismissing count two.

VI.

In the light of what has been already said the motions before me are disposed of as follows:

(1) Defendant's motion for summary judgment on the second claim for relief is granted. Since I find there is no just reason for delay, it is directed that final judgment in favor of defendant will be entered accordingly. Rule 54(b), F.R.C.P.

(2) Plaintiff's cross-motion for summary judgment on its first claim and on the counterclaims is in all respects denied.

(3) Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact

and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against the first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

This opinion shall constitute my specification of the facts supporting that holding pursuant to Rule 56(d), F.R.C.P. The case will be tried on the sole issue of the amount which defendant is entitled to assert by way of set-off.

It is so ordered.

Opinion, Dated July 16, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 480 and 481—September Term, 1969.

(Argued March 23, 1970 Decided July 16, 1970.)

Docket Nos. 32533 and 33864

BANCO NACIONAL DE CUBA,

Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Appellee.

Before:

LUMBARD, *Chief Judge*,

HAYS, *Circuit Judge*, and BLUMENFELD, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vanP. Bryan, *J.*, granting defendant-appellee's motion for summary judgment on its counterclaim against plaintiff-appellant. Reversed and remanded with directions.

VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz, Boudin & Standard, Leonard B. Boudin, and Kristin Booth Glen, on the brief) *for appellant*.

* Sitting by designation.

HENRY HARFIELD, New York, N. Y. (Shearman & Sterling, Wm. Harvey Reeves, and John J. Madden, Jr., on the brief, *for appellee.*

WALTER J. NEYLON, New York, N. Y., on the brief, *for Alicio Ruiz Martinez, Sr., et al., intervenors.*

LUMBARD, *Chief Judge:*

Plaintiff-appellant Banco Nacional de Cuba appeals from an order of the District Court for the Southern District of New York which granted summary judgment to defendant-appellee First National City Bank of New York (First National City) on Banco Nacional's two causes of action. Appellant has abandoned the second cause of action on this appeal, and thus only the first cause of action, which is based on the following facts, is before us on this appeal. First National City, when the Castro government of Cuba expropriated its properties there, forthwith sold collateral securing a loan it had made to Banco Nacional prior to the change in Cuba's government. The effect of Judge Bryan's order was to allow First National City to retain, as an offset against the value of its expropriated properties, the amount by which the proceeds from the sale of the collateral exceeded the amount then owing on the loan. We hold that allowing such an offset was error. The so-called Hickenlooper Amendment does not give to a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we reverse and remand to the district court for a factual finding as to the amount of the excess. Once this factual determination is made, we direct entry of summary judgment in favor of Banco Nacional on its first cause of action.

On July 8, 1958, First National City made a fifteen million dollar secured loan to Banco de Desarrollo Economico y Social (Bandes), a corporate agency of the gov-

ernment of the Republic of Cuba. Collateral for the loan was pledged by Banco Nacional de Cuba (Banco Nacional) and another Cuban government agency, Fondo de Estabilizacion de la Moneda (Fondo); this security was held in New York and consisted of bonds of the United States government and obligations of the International Bank of Reconstruction and Development.

The Castro forces seized control of the government of Cuba on January 1, 1959. Thereafter, on July 8, 1959, First National City renewed the fifteen million dollar loan to Bandes for another year. During the course of the ensuing year, two Cuban laws went into effect which resulted in the dissolution of Bandes and the succession by Banco Nacional to many of its rights and obligations, including the obligation to repay the fifteen million dollars, plus interest, to First National City. The Republic of Cuba also guaranteed that the loan would be repaid.[1]

First National City and Banco Nacional renegotiated the loan for the second time on July 7, 1960. Banco Nacional repaid one-third of the loan—five million dollars—and First National City released approximately one-third of the collateral. At Banco Nacional's request, First National City agreed not to demand repayment of the ten million dollar balance for one year.

On September 16, 1960, the Cuban militia occupied the eleven First National City branch offices in Cuba. Executive Power Resolution No. 2, issued by the Castro government the following day, formally confirmed that the branches had in fact been nationalized.[2]

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[1] The district court cited these laws as Cuban Law No. 730, February 16, 1960, and Cuban Law No. 847, June 30, 1960.

[2] Executive Power Resolution No. 2 was issued pursuant to Cuban Law No. 851, July 6, 1960. See *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d, 845, 849, 861-2 (2d Cir. 1962). Executive Power Resolution No. 2 is set out in the opinion of the district court, 270 F. Supp. at 1009-1010, note 6.

First National City retaliated almost immediately. On September 20, 1960, it notified Banco Nacional that it had closed Banco Nacional's accounts as of September 17 and that it was claiming the amounts on deposit therein as an offset against the nationalization of its properties in Cuba.[3] What is more important to the present appeal, on September 21 and 22, 1960, First National City sold the collateral held in New York as security on the ten million dollar loan. First National City received from that sale an amount —conceded to be at least $11,892,448 and perhaps as much as $12,412,000—which was substantially in excess of that required to discharge the ten million dollar principal sum and the interest thereon at the annual rate of 4 per cent for the period July 8, 1960 through the time of the sale.

II.

Banco Nacional instituted suit in November, 1960, against First National City to recover the excess realized on the sale of the collateral held as security for the loan. Its complaint also set forth a second cause of action for recovery of the deposits on the Cuban banks which First National City had retained. As Judge Bryan described it, First National City's answer raised "a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches." 270 F. Supp. at 1005. Both parties moved for summary judgment on both causes of action and on the counterclaims.

As to the second cause of action, Judge Bryan granted First National City's motion for summary judgment. Banco Nacional filed a notice of appeal from that portion of his

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[3] What had happened was that a number of private Cuban banks with deposits in First National City were nationalized pursuant to Cuban Law No. 891 in October 1960, and the confiscation decree declared that Banco Nacional was to have full title to the property of those banks. Thus, First National City, in notifying Banco Nacional, referred to the accounts as Banco Nacional's.

order, but is not pressing that appeal at this time.[4] In dealing with the first cause of action, Judge Bryan denied Banco Nacional's motion for summary judgment on its claim and on First National City's counterclaim. However, as to defendant First National City's motion for summary judgment on the first cause of action and the counterclaim, Judge Bryan ruled:

> Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against [Banco Nacional's] first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

270 F. Supp. at 1011.

It is this latter holding that is before us on this appeal. After Judge Bryan's order was filed, the parties entered into a stipulation providing that the value of First National City's property which had been confiscated in Cuba exceeds any amount which Banco Nacional could be awarded

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[4] We only observe that Judge Bryan's resolution of this issue was in compliance with the decision of this court in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. den., 382 U.S. 1027 (1960). We also note that the holding that the Cuban expropriation decrees are not entitled to extraterritorial enforcement in United States courts as to property located within the United States is distinct from the question whether the act of state doctrine — absent the Hickenlooper Amendment — bars an American court from inquiry into the validity of expropriations of American property within the territory of the expropriated nation.

On this appeal, certain intervenors point out that they claim some of these deposits. The court below, in granting summary judgment to First National City on Banco Nacional's second cause of action, did not reach these claims, which we assume will be litigated below at some time.

on its first cause of action to recover from First National City the excess amount realized on the sale of the collateral.[5]

III.

First National City claims that it is entitled to retain the excess amount realized on the foreclosure of the collateral as a set-off because the Cuban government confiscated its branch banks without providing adequate compensation, and that this act was a violation of international law. Judge Bryan properly observed that under the United States Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), "inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting 'in judgment of the acts of the government of another, within its own territory.'" 270 F. Supp. at 1007. However, Judge Bryan then concluded that the *Sabbatino* decision had been legislatively overruled "for all practical purposes," by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 USC. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965). He also noted that the Hickenlooper Amendment had been held constitutional in the Southern District of New York in the sequel to the *Sabbatino* litigation, *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957 (S.D.N.Y. 1965); we add that the district court decision in *Farr* was affirmed in a lengthy opinion by Judge Waterman, 383 F.2d 166 (2d Cir. 1967), and that Banco Nacional's petition for a writ of certiorari in that case was denied, 390 U.S. 1956 (1968).

Judge Bryan also held that the Hickenlooper Amendment directed him, regardless of the act of state doctrine, to determine "the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state 'in

[5] This stipulation was entered for purposes of this litigation, to avoid the necessity of a trial on the value of First National City's expropriated assets located in Cuba. See 270 F. Supp. at 1010-11.

violation of the principles of international law, including the principles of compensation.' " 270 F. Supp. at 1007. Proceeding to the merits, Judge Bryan held that the confiscation of First National City's branches did violate international law because adequate compensation was not provided and because the confiscation was a reprisal evidencing discrimination against nationals of the United States. 270 F. Supp. at 1007-1010. In light of this, he concluded that First National City was entitled to a set-off against Banco Nacional's claim to recover the amount left from the sale of the collateral after deduction of the principal and interest due and owing.

On this appeal, Banco Nacional makes three principal arguments. First, it claims that the act by which the Cuban government confiscated First National City's branches in Cuba was an act of state, that the Hickenlooper amendment is not applicable to the facts in this case, and thus that the district court should have followed Mr. Justice Harlan's opinion for the Court in *Sabbatino* and not inquired into the validity of the Cuban expropriation under international law.[6] Second, Banco Nacional argues that the Hickenlooper Amendment is unconstitutional.[7] Third, Banco Nacional contends, with some justification, that summary judgment on First National City's counterclaim was improper because: (1) the counterclaim was invalid procedurally in that it was directed at the Republic of Cuba, which is not an "opposing party" in the present suit under Rule 13 of the Federal Rules of Civil Procedure and the interpretations of that rule; or (2), assuming the counterclaim to be proper

[6] A sub-part of this argument is that, assuming the Hickenlooper Amendment applies to the facts or this case, Judge Bryan incorrectly applied international law in holding that the Cuban expropriations violated international law. However, appellant concedes that if this court holds the Amendment applicable to the case at bar, Judge Bryan's decision on this issue was in accordance with the decision of this court in *Banco Nacional* v. *Farr, supra.* 382 F.2d at 183-185; appellant states that it raises the issue only to preserve it for further appeal.

[7] Again, this issue was resolved against Banco Nacional in *Banco Nacional* v. *Farr, supra,* 383 F.2d at 178-183.

procedurally, Banco Nacional is not in fact liable for the obligations of the Republic of Cuba; or (3) because at the very least this latter question raised a triable issue of fact which was improperly resolved on a motion for summary judgment. Since we agree with Banco Nacional's first argument, we find it unnecessary to pass on the other contentions.

IV.

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964)[8] laid down a rule of federal law by which this court and all other courts are bound absent subsequent changes in the rule wrought by Congress or by the Supreme Court. In the course of his exhaustive opinion for the eight-member majority of the Court, Mr. Justice Harlan devoted considerable attention to the general problem of when domestic courts should decline to pass upon claims which draw into question the validity of the acts of foreign sovereign states. He observed that the

> "continuing vitality [of the act of state doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign policy,

[8] Reversing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

> the weaker the justification for exclusivity in the political branches."

376 U.S. at 427-8.

From this general discussion, Mr. Justice Harlan's opinion proceeds to a specific consideration of the problem posed when the courts of one nation purport to examine the validity under international law of another nation's expropriation of the property of foreign nationals. Examining the state of the international law on this question, the Court concluded that there was no extant definition of the limits of such power which could command anything approaching a substantial majority of informed opinion. *Id.* at 428. After canvassing some of the basic disagreements on the question,[9] the Court stated that "[i]t is difficult to imagine the courts of this country embarking on an adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430.

The Court's opinion also stressed that it is far wiser for the courts to defer to the Executive in the task of securing some form of compensation for citizens of the United States who have lost property through expropriation by a foreign state. The Executive can often achieve some form of general redress, whereas judicial determinations can have only an occasional impact.[10] Moreover, judicial

> "decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere

[9] 376 U.S. at 429-430.
[10] See section VI, *infra*.

> with negotiations being carried on by the Executive Branch and might render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect."

Id. at 431-2. Mr. Justice Harlan also dismissed the argument that American courts should examine the validity of foreign expropriations because in doing so they would make an important contribution to the development of international law as based on "the sanguine proposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principal by those adhering to widely different ideologies." 376 U.S. at 434-5.

Accordingly, the Court held "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428. There can be no doubt that the confiscation of First National City's branch offices in Cuba by the Cuban government was such a taking of property. As such it is an act of state the validity of which the Court has directed the Judicial Branch not to examine.

V.

The analysis just presented would suffice to decide this appeal but for the enactment of the Hickenlooper Amendment by Congress. The amendment, sometimes described during the Congressional debates as the "Sabbatino Amend-

ment,"[11] was passed in 1964, shortly after the Supreme Court rendered its decision in *Sabbatino*, and that fact is important in interpreting the language Congress used. In pertinent part, the Hickenlooper Amendment now provides:

> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection. . . ."

Judge Bryan held that the Hickenlooper Amendment overruled the *Sabbatino* decision "for all practical purposes" and that he was therefore required to disregard the act of state doctrine and to pass on the validity of the expropriations of First National City's branches in terms of international law. Banco Nacional takes the position that Judge Bryan's reading of the Hickenlooper Amendment is far too broad. We agree.

To understand the legislative history upon which Banco Nacional relies, it is necessary to sketch briefly the facts of *Sabbatino* itself. The case involved a shipment of Cuban sugar which was to have been purchased by an American commodity broker, Farr, Whitlock & Co., from the Cuban subsidiary of an American owned firm, C.A.V. Before the shipment could leave Cuba, all of the C.A.V.'s assets in Cuba were expropriated. Thereafter, the Cuban govern-

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[11] See e.g., Hearings before the Senate Committee on Foreign Relations on S. 2659, S. 2660, S. 2662, and H.R. 11380, 88th Cong., 2d Sess. (1964) at 449; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965).

ment allowed the shipment of sugar to leave Cuba, but only after Farr, Whitlock had entered into contracts, identical to its earlier agreement with C.A.V., with Banco Para Commercio Exterior de Cuba (Banco Exterior), an instrumentality of the Cuban government. The ship carrying the sugar was then allowed to sail from Cuba to Morocco. Banco Exterior assigned the bills of lading to Banco Nacional, which in turn assigned them to Societe Generale, a French bank which acted as Banco Nacional's agent in New York, for presentation to Farr, Whitlock for payment. In some manner, Farr, Whitlock obtained possession of the bills of lading from Societe Generale without making payment upon presentation. The money which Farr, Whitlock was supposed to pay for the shipment was also claimed by C.A.V. Thus, the dispute over the right to the proceeds of the sale of the expropriated shipment of Cuban sugar was between Banco Nacional, which in the words of the Hickenlooper Amendment claimed "title or other right ... based upon (or traced through) a confiscation," and C.A.V., an American-owned firm which had owned the sugar before the expropriation.

Sabbatino was handed down by the Supreme Court in March, 1964, and in April, 1964, Senator Hickenlooper proposed the initial version of a foreign aid bill amendment related to the case in the Foreign Relations Committee.[12] A Conference Committee rewrote the language in September, 1964, and the amended version was enacted on October 7, 1964, as section 301(d)(4) of the Foreign Assistance Act of 1964. Pub. L. 88-633, 78 Stat. 1009, 1013. It was changed slightly and re-enacted in its present form on Sep-

[12] "No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an *act* of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to *acts* that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

tember 6, 1965, as section 301(d)(2) of the Foreign Assistance Act of 1965. Pub. L. 89-171, 79 Stat. 653 22 U.S.C. § 2370(e)(2).[13]

It is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarly related to the facts of the *Sabbatino* case. At the time of the Congressional debates during 1964 and 1965, virtually all American-owned property in Cuba had been nationalized. Much of this property consisted of productive installations such as sugar plantations, fertilizer plants, mines, and oil production facilities. In light of this, when the Supreme Court in *Sabbatino* issued a ruling which would apparantly permit Banco Nacional to prevail over an American-owned firm in securing the proceeds of the sale of a shipment of expropriated sugar to an American commodity broker, the phrase "thieve's market for expropriated property" came into vogue. In explaining his proposal in an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieve's market," and explained further that the Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States." 110 Cong. Rec. 19548. At another time, he said "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936. The Senator further explained:

> "[The amendment] will discourage foreign expropriation by making sure that the United States cannot become a 'thieve's market' for the product of foreign expropriations.
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> * * * * *
>
> One of the principal reasons for the proposed amendment is that it will serve notice that foreign

[13] For a discussion of these changes see *Banco Nacional* v. *Farr*, *supra*, 383 F.2d at 171-2, and at 171, note 5.

> states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the United States free from litigation."

110 Cong. Rec. 19555, 19559 (1964). See also *id.* 19548, 19557.

When the Conference Committee reported the Amendment to the House of Representatives on October 2, 1964, Congressman Adair, its sponsor in the House, gave this explanation of its purpose:

> "It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] *may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States* or can resist a suit by the expropriating government to seize the property."

110 Cong. Rec. 23680 (1964) (emphasis added). Senator Hickenlooper described the provision in virtually identical terms in the Senate the following day. See 110 Cong. Rec. 24076-7 (1964).

The Hickenlooper amendment was further considered in the 89th Congress during 1965, particularly in hearings held by the House Committee on Foreign Affairs on its reenactment. The first witness at these hearings was Professor Cecil Olmstead, one of the original authors of the Hickenlooper Amendment, who represented the Rule of Law Committee—formed by a group of American companies which had suffered expropriations—in its support for the Amendment. He first discussed *Sabbatino,* describing its effect as follows:

> "... [I]f the former American owners of property expropriated abroad seek to recover that property when it turns up within the United States they are denied any kind of recourse to U.S. courts, both State and Federal, even in cases in which the expropriation is

uncompensated. . . . Specifically, this means that the fruits of such illegal expropriation could be marketed with impunity in the United States."

Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965), 578. See also *Id.* 579, 591, 592, 598-599, 601, 604-605, 612-615.

During Professor Olmstead's testimony, an instructive colloquy took place between Olmstead and Congressman Fraser, a member of the Committee. Mr. Fraser was interested in determining how broad the Amendment was. He asked:

"For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.

Does that situation come within the language of your amendment?

Mr. Olmstead: No, sir; that would not come within it. Our amendment has no provision in its scope to apply to property other than that actually expropriated by the foreign country itself."

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Mr. Fraser: You are saying it would be limited solely to situations where you actually—where what [was] at issue was the title of the [expropriated] property, that is the major issue?

Mr. Olmstead: Yes."

There followed a page of discussion about ore or oil from an expropriated mine or well coming back into this country, and Professor Olmstead then concluded: "Of course this amendment will only operate when *some proceeds of the illegal expropriation turn up in the United States,*" *id.* at 607-608 (emphasis added).

Attorney General Katzenbach, who testified before the same Committee the day after Professor Olmstead, took the same view. In his opening remarks in opposition to the Amendment he stated:

> "What are we taking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States. That is very unlikely to occur. . . . It is generally an accident because the owner of that property, or the foreign government involved, is not going to bring that property into this country and is deterred from doing it by the fact that normally, if that property is brought into this country, the assets from it are going to be frozen in an outstanding dispute with the foreign country."

House hearings, supra, at 1235. See also, *id.* 1236, 1237 (testimony of Mr. Katzenbach).

Congressman Gross, another member of the House Foreign Affairs Committee, urged that the Amendment be broadened to enable the owner of expropriated property to seize Cuban property in the United States as an offset for the value of property seized by Cuba. See House Hearings, *supra,* at 1249; see also *id.,* at 1050. As appellant Banco Nacional points out, this is precisely the position First National City takes in this litigation. However, First National City has cited no legislative history, and we have found none, which indicates that Mr. Gross' suggestion was thought to have been adopted by Congress when it reenacted the Hickenlooper Amendment.

Banco Nacional quotes the following colloquy between Mr. Katzenbach and Representative Gallagher of the House Foreign Affairs Committee as indicative of the legislators' and witnesses' understanding of the scope of the Amendment:

> "Mr. Gallagher: This amendment merely applied to property that works its way back into the United States; correct?
>
> Attorney General Katzenbach: Yes.
>
> Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that made the seizure?
>
> Attorney General Katzenbach: That is correct."

House hearings, *supra,* at 1247. See also colloquy between Mr. Katzenbach and members of the Committee, *id.* at 1245-1247; colloquy between Professor Henkin and Mr. Gallagher, *id.* at 1072; testimony of Professor Metzger, *id.* at 1025-1031; testimony of Professor McDougal, *id.* at 1043, 1050-1051; statement of the Committee on International Law of the Association of the Bar of the City of New York submitted to the House Foreign Affairs Committee in support of the Amendment, *id.* at 1316. See also Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Progrem, 89th Cong., 1st Sess. (1965), 728 (letter to Chairman Fulbright from George W. Ball); 730-760 (an appendix consisting of material submitted by Senator Hickenlooper, much of it from the earlier House hearings).

Given all of this background, we can find no basis for holding that the present case is one "in which a claim of title or other right to property is asserted by [First National City] . . . based upon (or traced through) a confiscation or other taking. . . ." 22 U.S.C. § 2370(e)(2). To do so would stand the statute on end. If one fact is clear from the legislative history, it is that this language was designed to be invoked by American firms in order to afford

them "a day in court"—and presumably a monetary recovery—when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country. We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalizes American property.[14]

VI.

Indeed, it seems to us that such an interpretation of the Hickenlooper Amendment would run counter to another important Congressional policy.

Through the provisions of Subchapter V of the International Claims Settlement Act of 1949, Pub. L. 88-666, 78 Stat. 1110, amended Oct. 19, 1965, Pub. L. 89-262, § 1, 79 Stat. 988; Nov. 6, 1966, Pub. L. 89-780, § 1, 80 Stat. 1365, 22 U.S.C. §§ 1643-1643k (1970 Supp.), on October 16, 1964, Congress provided for "the determination of the amount and validity of claims against the Government of Cuba . . . [arising] out of nationalization, expropriation, intervention, or other takings of . . . property of nationals of the United States . . . ." 22 U.S.C. § 1643 (1970 Supp.). Obviously, the expropriation of First National City's branches in Cuba gave rise to a claim of the sort which Congress intended to be submitted to the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643b(a) (1970 Supp.).

On the other hand, Congress and the Executive Branch have also acted, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1970 Supp.); Proc. 3447, 27 F.R. 1085, 3 C.F.R., 1959-1963 Comp., to block all Cuban assets present in this country as of July 8, 1963. See 31 C.F.R.

[14] See Henkin, Act of State Today: Recollections in Tranquility, 6 Col. J. of Transnational Law, 175, 184-5 (1967); see also *id.* 185, n. 40.

§§ 515, et seq. (1970).[15] At present there is no provision in the federal statutes or regulations providing for vesting of the blocked Cuban assets—whether assets of the Cuban government or of Cuban nationals—in the government of the United States for sale and use by the Foreign Claims Settlement Commission to pay those who have submitted claims to the Commission based on expropriations by the Cuban government.[16]

It is this system of claim submission and blocking of assets which First National City seeks to circumvent. Due to the Cuban expropriation of its branches, First National City felt justified in breaching whatever loan agreement it had entered with Banco Nacional on July 7, 1960, by prematurely foreclosing on the collateral held as security. It was fortunate for First National City that sale of the collateral brought more than enough money to cover the principal amount and interest then due on the loan. First

[15] The report of the Treasury Department, Office of Foreign Assets Control, on the census of blocked Cuban assets, is reprinted in House Hearings, *supra,* at 1264. The report states, as reprinted at 1264, that the Cuban assets control regulations were adopted "under section 5(b) of the Trading with the Enemy Act of 1917, as amended, to implement the policy of an economic embargo of Cuba set forth in Proclamation No. 3447, which was issued by the President under section 620(a) of the Foreign Assistance Act of 1961, Public Law 87-195."

[16] In 1964, when Congress enacted subchapter V of the International Claims Settlement Act of 1949, relating to claims against Cuba, it included as section 511(b) a provision vesting the blocked assets of the Cuban government in the United States government and further providing that the proceeds of such assets of the Cuban government should be used to reimburse the United States government for the expense of operating the Foreign Claims Settlement Commissions and the Department of the Treasury in processing claims against Cuba. Pub. L. 88-666, section 511(b), 78 Stat. 1113 (October 16, 1964). However, that section was repealed one year later, see Pub. L. 89-262, section 5, 79 Stat. 1988 (October 16, 1965). The report of the Senate Foreign Relations Committee states that "the committee was persuaded by the following argument advanced by the Department of State:

> 'it is the Department's view that vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of rights. The

National City was also fortunate in that they sold the security before Cuban assets were blocked in July, 1963. Had they waited, it seems clear, under 31 C.F.R. § 515.202 (1970), that any sale of the collateral put up by Banco Nacional as security on the loan in suit would have been impossible without a license from the Office of Foreign Assets Control of the Treasury Department. See 31 C.F.R. § 515.801 (1970). As matters now stand First National City has recouped dollar-for-dollar on the loan transaction; be its position on this appeal, it seeks something more.

We do not believe that First National City has any special claim to the excess proceeds of the sale of the collateral. Any judgment rendered in favor of Banco Nacional on its first cause of action would, after deduction of attorney's fees, become a blocked Cuban asset.[17] Presumably, if other attempts at settlement of the claims fail, the blocked

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Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalizations, expropriations, intervention, and taking. To vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world.' "

Sen. R. No. 701, 89th Cong., 1st Sess., 2 U.S.C. Code Cong. & Admin. News p. 3583 (1965).

It seems to us that Congress' acceptance of the State Department's argument points up to some extent the wisdom of Mr. Justice Harlan's observation in *Sabbatino* that to permit American courts to pass on the validity of expropriations would have an effect on "[r]elations with third countries which have engaged in similar expropriations." 376 U.S. at 432.

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[17] See Report of Treasury Department, Office of Foreign Assets Control, *Census of Blocked Cuban Assets, supra* note 15, reprinted in House Hearings, *supra,* at 1264.

First National City's judgment debt to Banco Nacional for the excess amount it holds would have to be reported to the Office of Foreign Assets Control on Form TFR-607 under any one of several classifications of "reportable property" specified on that form.

Cuban assets will eventually be vested in the United State government and the Foreign Claims Settlement Commi sion will begin compensation of the claimants. As part the pool of assets available for compensation, such a judg ment in favor of Banco Nacional would serve to provid at least partial compensation of all those claimants wh suffered losses in the Cuban expropriations. See testimon of Attorney General Katzenbach, House Hearings, *supra* at 1235-1236. No authority which First National City ha cited in its brief establishes any right to a preference such as that which would result if the decision of the district court were to be affirmed. While Judge Bryan noted in a footnote that "[a]ny sum which First National City is permitted to set-off in this action will of course have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City," 270 F. Supp. at 1011, note 10, we observe that such a set-off against its total claims with the Commission would still allow First National City a dollar-for-dollar recoupment on a significant portion of its total claim for the value of its expropriated property—something which few, if any, other claimants are likely to receive.[18]

The report also states that the deadline for filing reports for the Office's census of blocked Cuban assets was March 15, 1964. However, the report notes that there are probably many people holding blocked assets who did not know of the deadline, and states "extensions of time for filing were granted when necessary." There is little question that an extension would be granted in a situation such as the present case, where lengthy, litigation to settle the dispute over entitlement to the excess funds carried the parties past the filing deadline.

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[18] We note from the affidavit of First National City Bank submitted below that its claims for expropriated property is relatively small, about three million dollars, as compared to some claims which must have been filed by American corporations with large industrial operations in Cuba.

The windfall First National City seeks can best be understood through a hypothetical example. Assume that there are twenty claimants who have filed with the Foreign Claims Settlement Commission pursuant to 22 U.S.C. § 1643 (Supp. 1970). Ten claimants, called "A" claimants, each have claims for fifteen million dollars; four claimants, called "B" claimants each claim five million dollars. The

VII.

Since there is a factual dispute, to the extent of more than $500,000, between the parties as to the total amount realized from the sale of the collateral and as to the amount of interest properly deducted, which Judge Bryan was not called upon to resolve due to his disposition of the summary judgment motions, we remand to the district court for a determination of the exact amount of excess left after the principal sum and the interest due thereon is deducted from the proceeds of the sale of the security. When this determination is made, the district court is directed to grant Banco Nacional's motion for summary judgment on its first cause of action.

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twentieth claimant is First National City Bank which, for purposes of this example, also seeks five million dollars. Further, assume that absent the sum in dispute in this case the total value of blocked Cuban assets held by the Office of Foreign Assets Controls is 20 million dollars.

If the claims are eventually allowed to vest against the fund and some sort of pro rata payment authorized, First National City Bank will do considerably better if it is permitted to retain the Cuban assets which fortuitously were in its reach, rather than if it had merely held the excess here in dispute so that in time it would have been blocked and become part of the fund.

Assume First National City has seized the collateral, sold it, and realized three million dollars over the amount owed with interest. If, as it seeks in this suit, it keeps the three million as a set-off against its claims against Cuba, the fund compromised of all blocked assets would still equal twenty million dollars. However, the claims against the fund would be reduced from 200 million to 197 million, since First National City would have to off-set the three million dollars against the five million dollars we have assumed it has claimed with the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643 (Supp. 1970). On this basis, the pro rata share would be 10.9 cents on the dollar. The "A" claimants, seeking 15 million each, would each receive about 1.52 million; the "B" claimants, with claims for 5 million, would each take about .57 million. And First National City, with its claim reduced to 2 million, would receive about .24 million. But to this must be added the 3 million which it took directly, bringing its total recovery to 3.24 million.

In the second case, First National has not (or is not allowed to) take the 3 million for its own account; rather, it stays in Banco Nacional's name and in time becomes part of the fund. Now, the fund

Reversed and remanded for further proceedings consistent with this opinion.

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has 23 million, while the claims are 200 million, since First National City has nothing to off-set against its initial claim of 5 million. Here, the pro rata share would be about 11.5 cents on the dollar. The "A" claimants would receive about 1.73 million each, while the "B" claimants—including First National City—would take about .575 million each.

As can be seen, by resorting to self-help and avoiding the Congressional scheme for orderly settlement of these claims, First National City stands to profit considerably. Under our hypothetical figures, the difference is between 3.24 million and .575 million dollars. The windfall of course is not at the expense of Cuba, but rather comes out of the shares of all other American nationals who have lost property by the Cuban expropriation.

Order, Dated and Entered January 25, 1971

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 846

FIRST NATIONAL CITY BANK,

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

ORDER

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case.

Opinion, Dated April 27, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 798, 799—September Term, 1970.
(Argued March 18, 1971 Decided April 27, 1971.)
Docket Nos. 32533, 33864

BANCO NACIONAL DE CUBA,
Plaintiff-Appellant,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Frederick vanP. Bryan, *J.*, holding the act of state doctrine inapplicable and granting defendant's motion for summary judgment on its counterclaim against plaintiff. After our reversal and remand to the District Court, the Supreme Court remanded this case to us for reconsideration in light of the views of the Department of State.

We adhere to our prior decision and reverse and remand with directions.

VICTOR RABINOWITZ, New York, N.Y. (Rabinowitz, Boudin & Standard on the brief), *for appellant.*

HENRY HARFIELD, New York, N.Y. (Shearman & Sterling, Herman E. Compter and James B. Keenan, on the brief), *for appellee.*

* Sitting by designation.

LUMBARD, *Chief Judge*:

This case comes to us on remand from the Supreme Court for our reconsideration in light of the views of the Department of State expressed subsequent to our original decision which was filed on July 16, 1970. *Banco Nacional de Cuba* v. *The First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970). For the reasons stated below, we adhere to our prior decision and reverse and remand to the district court.

In the original action, Banco Nacional de Cuba brought suit against First National City Bank of New York in the Southern District. After the Castro government of Cuba had expropriated First National City's properties there pursuant to Cuban Law No. 851, First National City had sold collateral securing a ten-million-dollar loan it had made to Banco Nacional prior to the change in Cuba's government. From the sale of that collateral, First National City had received an amount—conceded to be at least $11,892,448 and perhaps as much as $12,412,000—which was substantially in excess of that required to discharge the ten-million-dollar principal sum and the four per cent interest thereon. Banco Nacional's suit was to recover the excess realized on that sale.

In the district court, First National City raised a series of counterclaims and setoffs based principally on the contention, that, since the Cuban government had confiscated its properties in Cuba in violation of international law, it was entitled to retain the excess on the sale of the collateral as an offset against the value of its confiscated properties. Judge Bryan in the Southern District granted summary judgment to First National City. *Banco Nacional de Cuba* v. *The First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

On appeal, we reversed the district court's judgment, holding that Cuba's confiscation of First National City's properties in Cuba was an act of state and that under *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the act of state doctrine foreclosed judicial inquiry into the

validity of that confiscation under international law. We held further that the Hickenlooper Amendment to the Foreign Assistance Act of 1964[1] did not apply here so as to defeat the act of state doctrine and thereby to give a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we concluded that allowing First National City its claimed offset against the allegedly unlawful expropriation was error; and we remanded to the district court for a factual finding as to the amount by which the proceeds of the sale of the collateral exceeded the amount then owing on the loan—which excess we directed should then be paid to Banco Nacional.

First National City petitioned for a writ of certiorari on October 13, 1970; and on November 17, 1970, the Legal Advisor to the Department of State wrote a letter to the Supreme Court expressing the views of that Department with respect to this case. The State Department's letter is set out in full in an appendix to this opinion. By order dated January 25, 1971, the Supreme Court granted certiorari and remanded the case to us without taking any position on the merits. The Supreme Court's order stated in full:

> "846 First National City Bank v. Banco Nacional de Cuba. The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case." 39 U.S.L.W. 3321 (January 26, 1971).

Upon reconsideration, we see no reason to change our initial decision on this appeal.

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[1] 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6 1965).

Basically, the State Department's letter of November 17 expresses the view that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine. It suggests that this Court is relieved from any restraint upon the exercise of its jurisdiction to adjudicate First National City's counterclaim arising out of the confiscation of its Cuban assets. The letter states that in this case

> "the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.
>
> The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

First National City argues that this letter constitutes the requisite statement by the Executive Branch which under our decision in *Bernstein* v. *N.V. Nederlandsche Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954), relieves the courts from applying the act of state doctrine to bar examination of the validity of the law in question. Because the interpretation of *Bernstein* will be crucial to our determination of the instant case, we set forth the background of *Bernstein* in some detail.

That case involved the alleged confiscation of the property of a single plaintiff, a Jewish German national, by the Nazi German government between 1937 and 1939. Plaintiff alleged that he was compelled by officials of that government, acting through threats of bodily harm, indefinite imprisonment, and death for plaintiff and his family, to assign his property to the German government. Beginning

in 1946 the plaintiff sought to attach and recover some of the proceeds of his former property in a suit brought in a state court in New York and removed to the federal district court. In the first *Bernstein* case, *Bernstein* v. *Van Heyghen Freres Societe Anonyme,* 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), we held, in an opinion by Judge Learned Hand, that the act of state doctrine prevented us from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi government; and we therefore affirmed the district court's dismissal of the complaint. However, in the course of his opinion, Judge Hand said that it was a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned does not apply." 163 F.2d at 249. After full consideration, we concluded that the Executive Branch had not in fact acted to relieve the courts of the restraint imposed by the act of state doctrine.

In the second *Bernstein* case, the same plaintiff brought a conversion action against another defendant — a Dutch corporation which, in participation in a plan with officials of the Nazi government, had confiscated and converted his stock in a German liability corporation. In that case, we reaffirmed our holding in the first *Bernstein* case that, because of the lack of a definitive expression of Executive policy, the act of state doctrine prevented judicial examination of official acts of the Nazi government. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.,* 173 F.2d 71 (2d Cir. 1949). We did remand the case for the purpose of allowing the plaintiff to allege, if he could, that his property had been seized by persons acting in a private capacity; but we ordered him to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government.

Following that decision, the State Department issued a press release quoting a letter from its Acting Legal Advisor. As the release stated, that letter

> "repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

When the case came before us again, we stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." 210 F.2d 375, 376 (2d Cir. 1954).

First National City argues that *Bernstein* requires that we change our prior decision in the instant case, as we did there, to conform with the State Department suggestions. It contends that since the Executive has now written a "Bernstein letter" exercising its prerogative in the area of foreign policy and suggesting that the act of state doctrine is inappropriate in this case, the policies underlying that doctrine, to which the Supreme Court gave crucial weight in *Sabbatino,* are not present here. According to First National City, judicial resolution of the issue raised by this claim would involve no encroachment on the Executive's prerogatives in the area of foreign affairs; there would be no invasion of the foreign government's sovereignty since Cuba itself sought the process of United States law; and there would be no burden on international trade, nor risk to innocent purchasers, since the sole question is whether one party has defenses that fairly curtail the recovery sought by the other party. Hence, says First National City, this Court should not apply the act of state doctrine here.

First National City contends further that without the bar of the act of state doctrine, we can and must hold in its favor—that it is entitled to set off against Banco Nacional's claim for relief such amount as may be due and owing it from the Cuban government as compensation for its confiscated Cuban property. Its argument in this regard runs as follows: In *Sabbatino,* we held that Cuba's seizures of property of United States nationals pursuant to Cuban Law No. 851 were in violation of international law. *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir. 1962). That substantive determination was not questioned by the Supreme Court in reversing us in *Sabbatino,* for the Supreme Court decided only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign. When this restraint was removed by the Hickenlooper Amendment, this Court was "unable to find any convincing reason, based on argument or new authority, for altering our holding in the original appeal," 383 F.2d at 183; and so we reaffirmed our previous holding that Cuban taking was invalid under international law. *Banco Nacional* v. *Farr,* 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 956 (1967). When the instant case came here, we felt that the restraint on an examination of validity, recognized in the Supreme Court's decision in *Sabbatino,* precluded the result we had reached in *Farr* because the Hickenlooper Amendment did not apply. Now, says First National City, the situation is altered by the subsequent expression of views by the State Department; and hence, in conformity with our decision in *Bernstein,* we should respond by following our decision on the merits in *Farr,* with respect to the same Cuban law.

We disagree. First National City's arguments are based wholly on the assumption that the so-called *Bernstein* exception to the act of state doctrine applies here since the State Department has written a letter. We fell that that assumption is erroneous. *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts.

As shown above, the facts in *Bernstein* were most unusual, to say the least, and bear no resemblance to those in the instant case. The acts of state there were performed by a German government with which this country had gone to war and which was no longer in existence at the time of the State Department's letter. Here, on the other hand, we have never been at war with Castro's Cuban government, and that government is both extant and recognized by the United States. Again, unlike the situation here, the State Department's letter in *Bernstein* was written during the aftermath of a great world war; and the Nazi government's actions, such as those of which Bernstein complained, had been condemned throughout the world as crimes against humanity. Furthermore, the letter in *Bernstein* went so far as to indicate that it was the affirmative policy of our government to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs.

The Executive itself seems to have recognized the uniqueness of *Bernstein,* for the Solicitor General's Brief as Amicus Curiae before the Supreme Court in the *Sabbatino* case states:

> "The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of State Department's letter. Moreover, the principal of payment of reparations by the successor German government had already been imposed, at the time of the '*Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of the reparations settlement."

There is still another important distinction between *Bernstein* and the case at bar. In *Bernstein,* as should be clear, the balance of equities was almost entirely on the side of the party opposing application of the act of state doctrine, the plaintiff, whereas here, as we found in our prior decision in this case, the contra is true, since First National City is seeking a windfall at the expense of other creditors. 431 F.2d, at 404n. 18.

In actual practice, as the Solicitor General's Amicus Brief in *Sabbatino* also recognizes, the *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a "Bernstein letter" has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed. *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd,* 376 U.S. 398 (1964); *Kane* v. *National Institute of Agrarian Reform,* 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd,* 153 So. 2d 40 (Fla. App. 1963).[2] The Supreme Court has never passed on the validity of the *Bernstein* exception; indeed, in *Sabbatino* it carefully avoided making any such determination. 376 U.S. at 420.

Furthermore, the Court in *Sabbatino* seemed to recognize one of the distinctions described above between a

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[2] The *Bernstein* case has, in a few other instances, been cited, but not in relevant situations. For example, in *Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (2d Cir. 1956) and *Republic of Iraq.* v. *First National City Bank,* 241 F. Supp. 567 (S.D.N.Y. 1965), the case was cited, although no Bernstein letter had been filed and the issue in the cases involved property located in the United States and hence not subject to the Act of State doctrine. In a few other instances the *Bernstein* case has been mentioned in passing, merely as an exception to the act of state doctrine. *Banco National* v. *Farr,* 243 F. Supp. 957 (D.C.N.Y. 1965); *Palicio* v. *Brush,* 256 F. Supp. 481 (D.C.N.Y. 1966); *Wyman* v. *United States,* 166 F. Supp. 766, 769 (Ct. Cl. 1958). In *Menendez Rodrigues* v. *Pan American Life Insurance Co.,* 311 F.2d 429 (5th Cir. 1962), the court treated the correspondence referred to in our decision in *Sabbatino,* as a Bernstein letter; but, as is noted above, our decision in *Sabbatino* was reversed by the Supreme Court.

Bernstein-type case and a case such as the one at bar. In discussing when the act of state doctrine should be applied, the Court stated that "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, . . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. It is clear that the confiscation of First National City's property in Cuba by the extant and recognized Cuban government comes within this holding, and the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in such cases.

For these reasons, we conclude that *Bernstein* is best left narrowly limited to its own peculiar facts and that, despite the State Department's letter of November 17, 1970, the exception to the act of state doctrine created by that case is inapplicable to the case at bar. Rather, we still find persuasive those cogent policy reasons for applying the doctrine which were articulated by Mr. Justice Harlan in *Sabbatino* and set forth in our prior opinion at 431 F.2d 397-99. Since we hold that the State Department's letter here does not bring this case within the narrow *Bernstein* exception, it is plain that that letter does not relieve us from applying the act of state doctrine to bar examination of the validity of the Cuban expropriation of First National City's property there.

Accordingly, we adhere to our prior decision and reverse and remand this case for further proceedings consistent with that decision and this.

APPENDIX

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

NOVEMBER 17, 1970

Honorable E. Robert Seaver
Clerk of the Court
United States Supreme Court

Dear Mr. Seaver:

The case of *First National City Bank* v. *Banco Nacional de Cuba* is before the Supreme Court on petition for a writ of *certiorari,* No. 846 filed October 13, 1970. The case involves a claim by Banco Nacional for excess collateral it had pledged with City Bank to secure a loan and a counterclaim by City Bank, up to the amount claimed by Banco Nacional, based upon Cuba's expropriation, without compensation, of property of City Bank in Cuba in 1960.[1] The Court of Appeals for the Second Circuit held that the exception to the Act of State doctrine created by 22 U.S.C. § 2370(e)(2)[2] did not apply to City Bank's claim against

[1] The District Court determined that Banco Nacional and the Government of Cuba are one and the same for purposes of this litigation.

[2] "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim or title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be

Cuba and that the Act of State doctrine, as expressed by the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), barred adjudication of City Bank's counterclaim.

The Department of State believes this second holding involves matters of importance to the foreign policy interests of the United States and requests that our views be conveyed to the Supreme Court.[3]

The Executive's role in suggesting that the act of state doctrine should not be applied with respect to a certain case or class of cases has been recognized both by the Department of State and in court decisions. This role, the so-called *Bernstein* exception to the act of state doctrine as applied by United States courts, was first clearly established in *Bernstein* v. *N.V. Nederlandsche Amerikaansche, Etc.*, 210 F.2d 375 (2nd Cir. 1954), where the court reversed its earlier holding, 173 F.2d 71 (2nd Cir. 1949), that the act of state doctrine precluded the court's adjudication of the validity of certain acts of the (Nazi) German Government. The basis for this reversal was a statement by Jack B. Tate, Acting Legal Adviser, Department of State, indicating that

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applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (Foreign Assistance Act of 1965, Sec. 620(e)(2), 22 U.S.C. § 2370(e)(2).

[3] We regret that our views could not have been brought to the attention of the lower courts. Unfortunately, it was only after the not-yet-published opinion of the Second Circuit Court of Appeals was handed down that the question of the appropriateness of State Department action arose, since it did not become clear until that time that the Sabbatino Amendment would be considered inapplicable. No formal request for a statement by the Department was made in this case until October 14, 1970, one day after the petition for writ of *certiorari* was filed.

> "The policy of the Executive, with respect to claims asserted in the United States for restitution of such property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

210 F.2d at 376. Thus the Executive had indicated that the act of state doctrine need not be applied in a certain class of cases; the applicability of the statement was not limited to the *Bernstein* case.

In *Banco Nacional de Cuba v. Sabbatino, supra,* the Supreme Court held that the act of state doctrine precluded the examination of the validity of the act of a foreign sovereign within its own territory, even where that act was allegedly a violation of international law. 376 U.S. at 436-37. The ruling was based on the Court's recognition of the Executive's prerogatives in the area of foreign affairs; it found the act of state doctrine "arising out of the basic relationships between branches of government in a separation of powers." *Id.* at 423. However, the Court specifically avoided ruling on the validity of the *Bernstein* exception. *Id.* at 436.

While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.

Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar

adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institution's counterclaims for their assets expropriated in the foreign country.

The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U.S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case — that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff — is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state — expropriation of defendant's Cuban property — occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to

bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

Sincerely yours,

JOHN R. STEVENSON.

HAYS, *Circuit Judge* (dissenting):

By refusing to apply the exception to the act of state doctrine announced by this court in the third *Bernstein* case, *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomevaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the majority is engaging in precisely the kind of judgment which the act of state doctrine has removed from judicial determination.

The majority's attempt to distinguish *Bernstein* shows a misapprehension of the basis upon which the *Bernstein* exception was formulated. *Bernstein* was a per curiam opinion in which this court set forth part of the text of a State Department letter. The court, making no independent evaluation of the letter itself, then stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Id.* at 376. Considerations such as the acts of the Nazi government, the fact that we were at war with the government in question, and the fact that that government no longer existed, all used by the majority to distinguish *Bernstein*, were set forth not by the court but by the State Department in its letter. Unless the majority wishes to overrule *Bernstein*, it must accept the *Banco Nacional* letter as an expression of Execu-

tive Policy and go no further. In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 420 (1964), the Court held that there had been no expression of Executive Policy.

More fundamental than a mere lack of conformity with *Bernstein,* however, is the fact that the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. The recognition of this conflict is the very reason for the *Bernstein* exception. The fundamental premise behind the act of state doctrine is that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1918). It is not the function of the courts to choose between competing foreign policy considerations and conclude that Nazi Germany is "bad" and that Cuba is "good." The attitude of the United States toward foreign powers must be left, as in *Bernstein,* to the decision of the other branches of government. As the Court said in Sabbatino, in discussing the related issue of a judicial determination of the right of a foreign country to sue in our courts, "[t]his Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence. . . ." *Banco Nacional de Cuba* v. *Sabbatino, supra* at 410. The majority has undertaken just such an assessment and, in doing so, ignores both the exception to the act of state doctrine in *Bernstein,* and the fundamental purpose of the doctrine itself. I must dissent from what I consider to be a deviation from our judicial function.

Order, Dated and Entered October 12, 1971

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

v.

BANCO NACIONAL DE CUBA,

Respondent.

ORDER

The petition for a writ of certiorari is granted.

Supreme Court of the United States

No. 70-295 ----, ~~October Term, 19~~

First National City Bank,

Petitioner,

v.

Banco Nacional de Cuba

ORDER ALLOWING CERTIORARI. Filed October 12, ----------, 19 71.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted.